24TH FEDERAL LITIGATION COURSE

DISCOVERY

I. DISCOVERY: SCOPE, LIMITATIONS, SIGNATURES, SANCTIONS AND SUPPLEMENTATION

A. Scope and Limits of Discovery.

1. Scope: Fed. R. Civ. P. 26(b)(1):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

a. "Relevancy" in the context of Fed. R. Civ. P. 26(b)(1) is broadly construed.

(1) "[A]ny matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case . . . [is relevant]. . . . [D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues . . . . Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 351 (1978) (citations omitted).

(2) "Relevant to the subject matter" is synonymous with "germane." See Wright & Miller, Federal Practice and Procedure: Civil § 2008 (1985). But see Steffan v. Cheney, 920 F.2d 74 (D.C. Cir. 1990).

(3) Inadmissibility at trial is not grounds for objection to discovery if the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." See Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) (Engineering document which was not produced during discovery and which contained references to other documents which were not produced so that discovery of original document would, at a minimum, have led to the discovery of additional documents was reasonably calculated to lead to the discovery of admissible evidence).

b. Privileged material is generally not discoverable.

(1) Privileges in the discovery context refer to those privileges found in the law of evidence. U.S. v. Reynolds, 345 U.S. 1, 6 (1953). See also Fed. R. Evid. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings").

(2) Claims of privilege must be made in writing and with specificity. The party claiming the privilege must "describe the nature of the documents, communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection. Fed. R. Civ. P. 26(b)(5).

(3) The privileges which may properly be invoked depend on the nature of action. Fed. R. Evid. 501.

(a) If federal law governs the action, (e.g. federal question cases) the privileges recognized by federal common law apply. Askew v. Rigler, 130 F.R.D. 26 (S.D.N.Y. 1990)

(b) If state law provides the rule of decision, either as to an element of the claim or a defense, (e.g. cases brought under diversity jurisdiction) then the privileges recognized under state law apply. Balistrieri v. O'Farrell, 57 F.R.D. 567 (D. Wis. 1972)

(c) When a federal court applies state law in a non-diversity case, e.g., in an FTCA action, it does so by adopting the state rule as federal law, thus "state law" does not provide the rule of decision within the meaning of Fed. R. Evid. 501 and federal law governs the privilege issue. Whitman v. United States, 108 F.R.D. 5, 6 (D.N.H. 1985); Mewborn v. Heckler, 101 F.R.D. 691, 693 (D.D.C. 1984). See generally Wright & Graham, Federal Practice and Procedure, Evidence § 5433.

(d) Exception: Work product immunity is governed by federal law, even in diversity (state law) cases. EDO Corp. v. Newark Ins. Co., 145 F.R.D. 18 (D. Conn. 1992)

(4) Privileges which typically arise in government litigation include:

(a) Military and State Secrets Privilege:

i) Privilege belongs to the government and must be asserted by it.

ii) Must be (1) a formal claim of privilege (2) lodged by the head of the department that has control over the matter (3) after actual personal consideration. United States v. Reynolds, 345 U.S. 1 (1953). See also Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980); Yang v. Reno 157 F.R.D. 625 (M.D. Pa. 1994).

(b) Non-discoverability of intra-agency advisory opinions, or the so-called "deliberative process privilege:"

i) Asserted in the same manner as state secrets privilege.

ii) Designed to protect internal decision-making process and thus encourage full and

free discussions of the various issues and policies by the participants.

iii) Two requirements: (1) information must be deliberative and (2) the information must be predecisional. U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993).

iv) Commonly used to protect aircraft accident safety investigations from disclosure. United States v. Weber Aircraft, 465 U.S. 792 (1984); Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), cert. den'd, 375 U.S. 896 (1963).

v) Caveat: If deliberations are in issue, they may be discoverable. Dep't of Econ. Dev. v. Arthur Andersen & Co., 139 F.R.D. 295 (S.D.N.Y. 1991).

(c) Work Product Immunity:

i) Protects documents and tangible things prepared by a party, his attorney, agent, or representative, when done in anticipation of litigation or for trial. Fed. R. Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947). See Leonen v. Johns-Manville, 135 F.R.D. 94 (D.N.J. 1990).

ii) May be overcome if the party seeking discovery has a substantial need for the materials sought and is unable, without undue hardship, to obtain the substantial equivalent by other means. Raso v. CMC Equip. Rental Inc., 154 F.R.D. 126 (E.D. Pa. 1994). Contemporaneous statements are typically so unique as to allow for no "substantial equivalent." Wright & Miller, Federal Practice & Procedure, Civil § 2025. Duck v. Warren, 160 F.R.D. 80 (E.D. Va. 1995).

iii) Even where a showing of need compels production, the impressions, conclusions and opinions of counsel are protected (absent fraud). In re Doe, 662 F.2d 1073 (4th Cir. 1981); FDIC v. Singh, 140 F.R.D. 252 (D. Me. 1992); Diamond State Ins. Co. v. Rebel Oil Co. 157 F.R.D. 691 (D. Nev. 1994). But cf. William Penn Life Assur. v. Brown Trans. & Storage, 141 F.R.D. 142 (W.D. Mo. 1990). See also In re San Juan DuPont Plaza Hotel Fire Lit., 859 F.2d 1007 (1st Cir. 1988); Shelton v. AMC, 805 F.2d 1323 (8th Cir. 1986).

iv) A disclosure by the client or even by counsel to someone other than an adversary does not waive protection. Westinghouse Elec. Corp. v. Rep. of Philippines, 951 F.2d 1414 (3rd Cir. 1991); Khandji v. Keystone Resort Mgt. Inc., 140 F.R.D. 697 (D. Colo. 1992); Data General Corp. v. Grumman Systems Corp., 139 F.R.D. 556 (D. Mass. 1991); Catino v. Travelers Ins. Co., 136 F.R.D. 534 (D. Mass. 1991).

(d) Attorney-Client Privilege:

i) Protects communications between an attorney and the client when made in connection with securing a legal opinion or obtaining legal services. Upjohn Co. v. U.S., 449 U.S. 383 (1981).

ii) Privilege does apply in the government setting. Green v. IRS, 556 F. Supp. 79 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984).

iii) Disclosure to any third party waives privilege. In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982) (Partial disclosure of otherwise privileged information waives privilege with respect to all communications regarding related subject matter); Harding v. Dana Transport, Inc. 914 F.Supp. 1084 (D.N.J. 1996); Draus v. Healthtrust, Incorporated-The Hosp. Co., 172 F.R.D. 384 (S.D. Ind. 1997) (Inadvertent disclosure waives the privilege).

(e) Non-discoverability of Medical Quality Assurance Records: Records created in a medical quality assurance program are confidential and privileged; they may be disclosed only as provided by statute. 10 U.S.C. § 1102. See W. Woodruff, The Confidentiality of Medical Quality Assurance Records, The Army Lawyer, May 1987, at 5; In re United States of America, 864 F.2d 1153 (5th Cir. 1989).

2. Mandatory disclosures under Fed. R. Civ. P. 26. Certain material must be disclosed to other parties, even absent a request for it.

a. **Initial disclosures.** Without receiving a discovery request and at or within 14 days of the meeting of the parties to plan for discovery held under Rule 26(f) (i.e., usually within 90 days after the defendant makes an appearance), each party must provide the others with:

(1) The name, address and telephone number of witnesses, who are "likely to have discoverable information that the disclosing party may use to support its claims or defenses" and the subjects of which these are knowledgeable;

(2) A copy of any document or a description of any document and all tangible things which the disclosing party may use to support its claims or defenses;

(3) A computation of damages – by damage category, and non-privileged factual material related to the nature and extent of injuries suffered;

(4) A copy of any insurance agreement under which an insurance business may be liable to satisfy any potential judgment.

b. Certain categories of cases are excluded from the initial disclosure requirement. These include:

(1) actions based on an administrative record;

(2) petitions for habeas corpus;

(3) actions brought *pro se* by persons in custody of the United States;

(4) actions to enforce or quash a subpoena or an administrative summons;

(5) actions, by the United States, to recover benefits;

(6) proceedings ancillary to proceedings in other courts;

(7) actions to enforce arbitration awards.

b. A party may not withhold its own initial disclosure because its adversary has failed to comply with this requirement or made an inadequate disclosure.

c. **Expert disclosures**.

(1) The identity of all experts who may be used at trial must be disclosed to the other parties at the time specified by the court, and in no event, less than 90 days before trial.

(a) The disclosure requirement applies to <u>all</u> experts, not just those specially retained;

(b) The scope of the disclosure required for a specially retained expert is substantially greater than for expert witnesses who were not specially retained.

(2) Experts who will present testimony solely to rebut the evidence presented by specially retained witnesses of an

adversary may be designated 30 days after the initial expert disclosure, unless the court orders otherwise.

d. **Pretrial disclosures.**

(1) No later than 30 days prior to trial, unless the court orders otherwise, the parties must disclose:

(a) the identification of all "will call" and "may call" witnesses;

(b) a designation of any testimony which is expected to be presented by deposition, and if the deposition was not stenographically transcribed, a transcript of those designated portions;

(c) the identification of all documents or other exhibits expected to be offered or which may be offered at the trial.

(2) Within 14 days after these disclosures are made, the opposing parties may serve objections to the deposition designations and objections to the admissibility of documents and exhibits. Objections to admissibility, other than on the basis of relevancy, not raised are waived.

3. Scope of discovery for expert witnesses: Fed. R. Civ. P. 26(b)(4).

a. Discovery from experts expected to testify.

(1) Parties may depose expert witnesses retained by their adversaries.

(a) If the court requires the 26(a)(2) expert reports to be exchanged, the deposition cannot be conducted until the report is provided. See Freeland v. Amigo, 103 F.3d 1271 (6th Cir. 1997).

(b) The party seeking discovery must ordinarily pay the reasonable expenses of the expert in responding to discovery. Mathis v. NYNEX, 165 F.R.D. 23 (E.D.N.Y. 1996); but see Reed v. Binder, 165 F.R.D. 424 (D.N.J. 1996) (would be manifestly unjust to force indigent plaintiff to pay defendant's excessive number of experts).

(2) Rule 26(a)(2)(B) sets forth the material which must be produced under the mandatory disclosure requirement and, therefore, also describes some of the information ordinarily discoverable, including:

(a) "all of the opinions to be expressed [by the expert] and the basis and reasons therefor;"

(b) "the data or other information considered by the witness;"

(c) "any exhibits to be used as a summary of or support for the opinions;"

(d) the witness' qualifications including "a list of all publications authored by the witness within the preceding ten years;"

(e) the compensation the witness is receiving for "study and testimony," and;

(f) "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

Ngyuyen v. IBG, Inc. 162 F.R.D. 675 (D. Kan. 1995).

b. Discovery from retained experts who are not expected to testify is ordinarily prohibited. See Coates v. A.C. & S., Inc., 133 F.R.D. 109 (E.D. La. 1990). Fed. R. Civ. P. 26(b)(4)(B):

> A party may . . . discover facts known or opinions held by an expert who has been retained or specially employed . . . in anticipation of litigation or preparation for trial and who is not expected . . . [to testify at trial], only as provided in Rule 35(b) or upon a showing of

exceptional circumstances under which it is impracticable . . . to obtain facts or opinions on the same subject by other means.

(1) In-house experts can be "specially employed" but their pre-retention knowledge and opinions are subject to full discovery. In re Shell Oil Refinery, 134 F.R.D. 148 (E.D. La. 1990).

(2) Providing the work-product of a non-testifying expert to a testifying expert may make it discoverable. Douglas v. University Hosp., 150 F.R.D. 165, 168 (E.D. Mo. 1993), aff'd 34 F.3d 1070.

B. Limitations on Discovery.

1. Limitations imposed by the rules.

a. **Timing.** Discovery may not be initiated until initial disclosures are made and the parties have conferred to plan for discovery. Fed. R. Civ. P. 26(d). Before the December 2000 amendments to the Rules, this requirement, and many other discovery limitations could be avoided by local district court rules. It no longer may be. One principal objective of the December 2000 amendments was to establish uniform national discovery practices for federal courts. Thus, many of the requirements imposed by local rules – in contradiction to requirements of the federal discovery rules - are no longer permissible.

b. **Interrogatories**. A party may propound 25 interrogatories, including sub-parts. Fed. R. Civ. P. 33(a).

(1) An interrogatory composed of several sub-sections may be counted as a single interrogatory or as multiple interrogatories. The relevant determination is whether the interrogatory requests information about "discrete separate subjects." Note of Advisory Committee on Rules, 1993 Amendment.

(2) The number of permissible interrogatories can be increased by leave of court or by written stipulation between the parties.

(3) The court may impose different limitations on interrogatories by a case management order.

c. **Depositions.** Plaintiffs, defendants, and third-party defendants are limited to ten depositions in total. Fed. R. Civ. P. 30(a)(2)(A) & 31(a)(2)(A).

(1) Leave of court, or a written stipulation between the parties, is required in order to take:

(a) Depositions in excess of ten;

(b) The deposition of any person in confinement;

(c) The deposition of anyone who has previously been deposed in the case;

(d) A deposition prior to the Rule 26(f) discovery planning conference.

(2) The court may impose different limitations on depositions by a case management order.

3. Limitations imposed by the forum.

a. The court, by a case management order, may alter the limitations on depositions and interrogatories, or may impose restrictions on the length of depositions and the number of requests for admission. Local rules can impose limitations on the number of requests for admission which may be served.

b. The court may also limit discovery, by order or either *sua sponte* or in response to a motion for a protective order under Fed. R. Civ. P. 26(c), if it determines that:

(1) "[T]he discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(1)(i). See Baine v. General Motors, 141 F.R.D. 332 (M.D. Ala. 1991); Doubleday v. Ruh, 149 F.R.D. 601 (E.D. Cal. 1993).

(2) "[T]he party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought." Fed. R. Civ. P. 26(b)(1)(ii).

(3) The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery sought to the questions at issue. Fed. R. Civ. P. 26(b)(1)(iii). See Rainbow Investors Group, Inc. v. Fuji Trucolor Missouri, Inc., 168 F.R.D. 34 (W.D. La. 1996).

c. The discovery of electronic evidence, particularly "inaccessible electronic evidence," has caused courts to formulate new tests for the determination of whether discovery is "unduly burdensome or expensive," and encouraged courts to enter orders shifting the cost of discovery to the party seeking the production. See Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.RD. 421 (S.D.N.Y. 2002); Zubulake v. UBS Warburg, LLC, No. 02 Civ 1243, 2003 WL 21087884 (S.D.N.Y. May 13, 2003). In determining whether to shift courts may consider:

(1) The extent to which the request is narrowed to the discovery of relevant information;

(2) Whether the evidence produced is or was available from other, less costly, sources;

(3) The cost of producing the evidence in relation to the amount in controversy;

(4) The cost of producing the evidence in relation to the resources of each party;

(5) The relative ability of each party to control costs and its incentive to do so;

(6) The significance of the issues at stake;

(7) The relative benefit – to the various parties – of the evidence produced.

4. Protective orders limiting discovery may also be sought under Rule 26(c), but the party seeking protection bears a substantial burden of showing entitlement. See In re Agent Orange Product Liability Litigation, 104 F.R.D. 559 (E.D.N.Y. 1985). NOTE: Seeking a protective order does not absolve movant of the duty to respond. Williams v. AT&T, 134 F.R.D. 302 (M.D. Fla. 1991).

   a. A motion seeking a protective order must be accompanied by a certification that the moving party conferred with the affected parties in an attempt to resolve the dispute.

   b. The court has broad discretion in fashioning protective orders. See Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir. 1992).

C. Signing Discovery Requests and Responses.

1. "Every disclosure [under Rule 26(a)(1) or (a)(3)] shall be signed by at least one attorney of record . . . . The signature . . . constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made." Fed. R. Civ. P. 26(g)(1).

2. "Every discovery request, response, or objection . . . shall be signed by at least one attorney of record . . . ." Fed. R. Civ. P. 26(g)(2):

   "The signature . . . constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response or objection is:

   (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

   (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

   (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Fed. R. Civ. P. 26(g) (emphasis added). See Brandt v. Vulcan, Inc., 30 F.3d 752, 756 n. 8 (7th Cir. 1994).

3. "Reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions arrived at are reasonable under the circumstances. The standard is objective, not a subjective "bad faith" test. While the attorney's signature does not certify the truthfulness of the client's factual responses, it does certify that the lawyer has made reasonable efforts to assure that the client has provided all the information and documents available to him that are responsive to the discovery request.

4. If a certification is made in violation of the rule, the court SHALL impose an appropriate sanction upon the person who made the certification. The court may also sanction the party, or the person signing and the party. Sanctions may include an order to pay the reasonable expenses incurred because of the violation, including a reasonable attorney's fee. Fed. R. Civ. P. 26(g)(3). Malautea v. Suzuki Motor Corp., 148 F.R.D. 362 (S.D. Ga. 1991) aff'd 987 F.2d 1536, cert. den'd, 510 U.S. 863. The criteria for awarding sanctions are similar to those under Rule 11. In re Byrd, Inc., 927 F.2d 1135 (10th Cir. 1991); Apex Oil Co. v. Belchor Co. of New York, Inc., 855 F.2d 1009 (2d Cir. 1988).

5. The provisions of Fed. R. Civ. P. 11 do not apply to discovery pleadings.

6. Agency counsel are generally expected to prepare and sign the answers to interrogatories directed to the agency or the United States when the interrogatories seek information within the knowledge of the agency. United States Attorneys Manual § 4-1.440.

D. Supplementing Responses to Discovery - Fed. R. Civ. P. 26(e).

1. A party has a duty to supplement any disclosures made under Rule 26(a), at appropriate intervals, whenever the party determines that "in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1).

2. A party must seasonably supplement responses to interrogatories, requests for production or requests for admission "if the party learns that the response is in some material respect incomplete or incorrect and if the

additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(2).

3. Generally, there is no obligation to supplement deposition testimony. However, where an expert's deposition is used in whole or in part to satisfy the disclosure requirement of Fed. R. 26(a)(2), a duty to supplement may arise. See also, Freund v. Fleetwood Enterprises, Inc., 956 F.2d 354 (1st Cir. 1992); Blumenfeld v. Stuppi, 921 F.2d 116 (7th Cir. 1990); Bradley v. United States, 866 F.2d 120 (5th Cir. 1989). (Failure to supplement response with identity of expert or substance of his/her facts and opinions may bar use of expert at trial.)

4. Supplementation must be timely ("seasonable"). Fusco v. General Motors Corp. 11 F.3d 259 (1st Cir. 1993) (providing a videotape related to expert testimony on liability one month before trial not seasonable); Davis v. Marathon Oil Co., 528 F.2d 395 (6th Cir. 1975) (supplementation of witness list three days before trial warrants excluding them as witnesses); Royalty Petroleum Co. v. Arkla, Inc., 129 F.R.D. 674 (D. Okla. 1990) (supplemental interrogatories on eve of trial warranted excluding testimony on that issue).

5. Counsel who fail to take immediate remedial measures when additional or corrective information is discovered risk running afoul of the duty of candor to the tribunal. See United States v. Shaffer Equipment Co., 796 F.Supp. 938 (S.D. W.Va. 1992)(Government CERCLA cost recovery action dismissed because government counsel violated duty of candor to the tribunal), aff'd in part and rev'd in part, 11 F.3d 454 (4th Cir. 1993).

6. Court can order further supplementation of disclosures or discovery responses.

E Sanctions for Discovery Abuses.

1. Automatic Sanctions.

a. "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c).

(1) No motion is required. However, upon motion and after an opportunity to be heard, the court may impose additional sanctions, including:

(a) reasonable expenses, including attorney's fees, and;

(b) advising the jury of the party's failure to disclose the evidence.

2. Sanctions available upon application to the court. Fed. R. Civ. P. 37.

a. Compelling Discovery. Fed. R. Civ. P. 37(a).

(1) The court wherein the action is pending or the court for the district where a deposition is being taken, may, upon application, enter an order requiring the discovery to take place as requested.

(2) A motion is appropriate when:

(a) The deponent refuses to answer a question posed during a deposition. In such a case, the questioner may adjourn or complete the deposition before seeking the court's intervention.

(b) A party fails to answer an interrogatory.

(c) A party refuses to produce documents or allow inspection as requested.

(d) A party fails to designate an individual pursuant to Fed. R. Civ. P. 30(b)(6).

(3) An evasive or incomplete answer is treated as a failure to respond.

(4) Any motion to compel must include a certification that the moving party attempted, by conference with the person or party resisting discovery, to resolve the matter before seeking court intervention.

(5) In addition to ordering the discovery to take place, the court "shall" order the party or deponent whose conduct necessitated the motion, or the attorney, to pay the moving party the expenses incurred, including a reasonable attorney's fee unless the court finds the opposition was substantially justified or other circumstances make an award unjust.

(6) An award of costs shall also be awarded when the discovery is provided after the motion is filed.

(7) If the motion to compel is denied, the moving party must pay the costs unless the court finds that the making of the motion was justified or other circumstances makes an award unjust.

b. Sanctions for failure to obey the motion to compel.

(1) A deponent who refuses to be sworn or to answer questions after being directed to do so may be held in contempt of court. Fed. R. Civ. P. 37(b)(1). See Mertsching v. U.S., 704 F.2d 505 (8th Cir. 1983).

(2) Oral discovery orders must be complied with and disobedience can give rise to Rule 37 sanctions. Avionc Co. v. General Dynamics Corp., 957 F.2d 555 (8th Cir. 1992); Bhan v. NME Hospitals, Inc., 929 F.2d 1404 (9th Cir. 1991).

(3) Fed. R. Civ. P. 37(b)(2) provides for a wide range of possible sanctions for disobedient parties:

(a) An order establishing facts. See Chilcutt v. U.S., 4 F.3rd 1313 (5th Cir. 1993), reh'g den'd, and cert. den'd 513 U.S. 979. Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982).

(b) An order precluding a party from supporting or opposing a claim or defense or prohibiting him from introducing certain evidence. See Parker v. Freightliner Corp., 940 F.2d 1019 (7th Cir. 1991); Bradley v. U.S., 866 F.2d 120 (5th Cir. 1989); Callwood v. Zurita, 158 F.R.D. 359 (D. Virgin Islands 1994).

(c) An order striking pleadings. See Green v. District of Columbia, 134 F.R.D. 1 (D.D.C. 1991); Frame V. S-H, Inc. 967 F.2d 194 (5th Cir. 1992).

(d) An order staying the proceedings until compliance.

(e) An order dismissing the action or rendering judgment by default against the disobedient party. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976). But see, Fed. R. Civ. P. 55(e) ("No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.") See Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union, 2003 WL 186645 (S.D.N.Y. Jan. 28, 2003).

(f) An adverse jury instruction. See Residential Funding Corp. v. DeGeorge Home Alliance, Inc. 306 F.3d 99 (2nd Cir. 2002).

(g) An order holding the disobedient party in contempt of court.

(h) Monetary sanctions may be imposed on the party, its attorney(s) (including government counsel), or both. U.S. v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980); Pereira v. Narragansett Fishing Corp.,135 F.R.D. 24 (D. Mass. 1991); F.D.I.C. v. Conner, 20 F.3d 1376 (5th Cir. 1994) (Government attorney required to pay costs from personal funds.)

(4) Sanctions imposed on party need only be "just" and related to the infraction in question. See Boardman v. National Medical Enterprises, 106 F.3d 840 (8th Cir. 1997)

(5) The "drastic" remedy of dismissal is reserved for the most flagrant violations. In re Exxon Valdez, 102 F.3d 429 (9th Cir. 1996); Bluitt v. ARCO Chemical Co., 777 F.2d 188 (5th Cir. 1985); Spence v. Maryland Cas. Co. 803 F.Supp 649 (W.D.N.Y. 1992) aff'd 995 F.2d 1147. But see Morgan v. Massachusetts General Hosp. Corp., 704 F.2d 12 (1st Cir. 1983). Such actions will only be taken in egregious circumstances (e.g., bad faith, willfulness, or fault). See Refac Intern. Ltd. v. Hitachi Ltd., 921 F.2d 1247 (Fed. Cir. 1990); Monroe v. Ridley, 135 F.R.D. 1 (D.D.C. 1990).

c. A party's failure to attend its own deposition, to answer interrogatories or to respond to requests for production is immediately sanctionable (i.e. the movant need not first secure an order compelling disclosure). Any of the various sanctions, save contempt, may be imposed. Blue Grass Steel, Inc. v. Miller Bldg. Corp. 162 F.R.D. 493 (E.D. Pa. 1995).

d. Expenses upon failure to admit.

(1) If a party refuses to admit the genuineness of a document or the truth of a fact as requested under Fed. R. Civ. P. 36, and the requesting party subsequently proves the genuineness of the document or the truth of the fact, the party refusing to admit may be ordered to pay his opponent's expenses. U.S. v. Watchmakers of Switzerland Information Center, Inc. 25 F.R.D. 197 (C.D.N.Y. 1959).

(2) The court "shall" order payment of the reasonable expenses, including attorney's fees, unless it finds that:

(a) The request was objectionable.

(b) The admission sought was of no substantial importance.

(c) The party refusing to admit had reasonable ground to believe he might prevail.

(d) There were other good reasons for the failure to admit.

e. The court may require a party or an attorney to pay the reasonable expenses incurred by reason of that party or attorney's failure to confer and assist in the development of a discovery plan. Fed. R. Civ. P. 37(g).

f. The court may impose a sanction upon any person who has "frustrated the fair examination of [a] deponent." The sanction may include reasonable attorneys fees and costs incurred by other parties as a result of the offensive conduct. Fed. R. Civ. P. 30(d)(2).

II. DISCOVERY: STRATEGY, PRACTICE AND PROCEDURE

A. Planning for discovery.

1. Discovery in every case should begin with the formulation of a discovery strategy.

f. The discovery strategy should address the following questions:

(1) What information do I have an affirmative obligation to disclose?

(2) What information do I need to obtain?

(3) Who has the information I need?

(4) In what posture in the litigation do I hope to place my adversary through discovery?

(5) What posture in the litigation do I want to avoid?

(6) What information do I have which my adversary will try to obtain and how can I best marshal and present it or prevent its disclosure?

g. Consider the following when preparing the discovery strategy:

(1) The nature and complexity of the legal issues involved;

(2) The amount in controversy or the importance of the principles and positions being attacked by the adversary;

(3) The strategy for the defense of the case;

(4) The number and nature of the parties in the litigation;

(5) The issues likely to be contested and to be conceded.

h. The discovery strategy must be formulated prior to the Rule 26(f) pre-discovery conference of the parties.

i. Check local rules. The December 2000 amendments to the Rules was intended to standardize discovery practice in the U.S. District Courts. Nevertheless, the implementation of the federal rules governing discovery has always varied widely from district to district and sometimes within each division of a district. The importance of securing an up-to-date copy of the local rules of court cannot be overstated.

(1) Local rules may impose additional or different limits on the frequency and amount of discovery than those imposed by the federal rules. E.g., limitations on the number of requests for admissions a party or local conditions for the 26(f) conference. Although the December 2000 amendments should reduce the number of discovery practice variations, some will surely remain.

(2) The particular format for discovery papers, as well as other pleadings and motions, may be set out in the local rules.

(3) Local rules may memorialize customary discovery time limits, alter the time for objecting to discovery, establish procedures for requesting a discovery conference, and delineate the steps that a party must take to resolve a discovery dispute. They may also require a party to set forth certain information with regard to documents for which a privilege is asserted.

(5) Local rules may provide for "uniform discovery definitions" or uniform discovery that must be answered.

(6) Local rules versus "local practice". Local practices may vary considerably from local rules. Consult with a local practitioner if possible.

2. Rule 26(f) pre-discovery conference and discovery plan.

a. Except in specified excepted cases or where a court order provides otherwise, all parties are required to confer before beginning discovery in any action.

b. The conference should be held "as soon as practicable" but not later than 21 days before a scheduling conference is held or a scheduling order is due. See Fed. R. Civ. P. 16(b). Rule 16(b) orders are required within 90 days of the appearance of the defendant, making a 26(f) conference necessary within the first 69 days after an appearance.

c. Topics to be covered at the conference include the nature of the claims and defenses, the likelihood of settlement or other resolution of the case, the conditions for the exchange of mandatory disclosures, and an appropriate discovery plan for the case.

d. All parties are jointly responsible for providing the court with a report within 14 days of the conference outlining the discovery plan. The plan must include:

(1) any agreements regarding initial disclosures, including a statement of when these were or will be made;

(2) the subjects of future discovery, when discovery will be completed, and whether discovery will be phased or limited to certain subject areas;

(3) whether amendments to the limitations on discovery imposed by the federal rules or by the rules of court are necessary for this case;

(4) whether any protective orders regarding discovery or any scheduling or other Rule 16 order should be entered.

e. Rule 26(f) permits the court, by order or local rule, to require that the conference be held less than 21 days prior to the scheduling conference and to require an oral, rather than written report concerning the discovery plan. This amendment was one of the few concessions to those districts which have expedited discovery calendars made by the December 2000 amendments.

3. Implement the discovery strategy by outlining the tasks to be performed in sequence.

a. Complex cases may require a formal discovery planning document assigning tasks and suspense dates to various attorneys involved in the case. In simpler cases, counsel's hand-written notes may suffice as a discovery outline. In any case, the outline should be continuously reviewed and modified as tasks are completed and information is generated.

b. A complete outline includes provisions for providing mandatory disclosures and for responding to opposing discovery, including marshalling any documents or tangible things expected to be requested by the opposing party, and identifying and interviewing any witnesses who will be identified by opposing counsel.

4. The amount of discovery required will depend upon the specifics of the case and available resources.

5. The discovery outline and its implementation in a given case should serve several purposes:

a. It should provide you with useful information in a timely manner.

(1) Facts and testimony should be gathered in time to make effective use of it in subsequent discovery (e.g. expert depositions);

(2) All of the evidence gathered should be consistent with the theories to be advanced at trial.

b. It should use your available resources, including time, efficiently.

c. It should place you in the best negotiating position possible.

d. It should preserve and advance your defenses.

e. It should avoid unnecessary and unflattering appearances before the judge.

B Filing discovery pleadings. Rule 5 (d) provides that Rule 26(a) disclosures and discovery pleadings (i.e. all requests and responses, including interrogatories, requests for documents or to permit entry onto land, requests for admissions and depositions) are not filed until they are used in proceeding or filing is ordered by the court.

C Using the Right Tool for the Right Job (at the right time).

1. Interrogatories (Fed. R. Civ. P. 33).

a. General procedure.

(1) Written questions covering the entire gamut of material and information within the general scope of discovery propounded to a party. Interrogatories directed to a specific agent or employee who is not a named party are improper. Waider v. Chicago, R.I., & P. Ry. Co., 10 F.R.D. 263 (D.C. Iowa 1950).

(2) No more than 25 interrogatories, including all discrete subparts, may be served without leave of the court or agreement of the parties. Check local rules for additional or different requirements.

(3) Unless an objection to the interrogatory is interposed, they must be answered separately and fully under oath. Answers must include all information known by the party or his attorney. See Law v. National Collegiate Athletic Ass'n, 167 F.R.D. 464 (D.Kan. 1996) vacated 96 F.3d 1337; Naismith v. PGA, 85 F.R.D. 552 (D.C. Ga. 1979). When the party is a corporation or a governmental agency, the party can designate an individual to answer the interrogatories and will be bound by the responses. Mangual v. Prudential Lines, Inc., 53 F.R.D. 301 (D.C. Pa. 1971). The attorney for the corporation or governmental agency can answer. Wilson v. Volkswagen of American, 561 F.2d 494, 508 (4th Cir. 1977); Catanzaro v. Masco Corp., 408 F. Supp. 862, 868 (D.C. Del. 1976); United States v. 58.16 Acres of Land, 66 F.R.D. 570 (D.C. Ill. 1975). Ordinarily, an unsworn declaration made under penalty of perjury may be used to satisfy the requirement that the interrogatories be executed under oath. 28 U.S.C. § 1746.

(4) Answers are signed by the party responding; objections are signed by the attorney making them. But note Fed. R. Civ. P. 26(g) which requires the signature of the attorney of record on the answers as well.

(5) Can be used at trial to extent permitted by the rules of evidence.

(6) Party responding can produce business records or files in lieu of answering if the answers can be found therein and, as between the responder and the inquirer, the burden of finding the answers would be equal. Fed. R. Civ. P. 33(d). See Rainbow Pioneer v. Hawaii-Nevada Investment Corp., 711 F.2d 902 (9th Cir. 1983); Walt Disney Co. v. DeFabiis, 168 F.R.D. 281 (C.D. Cal. 1996).

(7) Answers must be served within 30 days unless the court orders a shorter or longer time for response, or the parties agree to same. Failure to timely object constitutes a waiver of any objection including that the information sought is privileged. See, e.g., United States v. 58.16 Acres of Land, 66 F.R.D. 570, 572 (D. Ill. 1975).

b. Drafting Considerations.

(1) Unlike questions asked at a deposition, the answers to interrogatories will be "word-smithed" by the opposing party's attorney. Careful drafting is important. Any excuse to avoid answering an interrogatory will be offered. Don't expect to get a smoking gun out of an interrogatory answer.

(2) The following areas are appropriate for interrogatories in most cases:

(a) Background information on the plaintiff that will usually take some research to produce, such as the dates of past medical treatment, former residences, names and addresses of employers, etc. These items can be acquired through interrogatories rather than wasting deposition time.

(b) Factual details that are not controversial but are not included in the Complaint or Answer.

(b) The application of law to fact or the party's contentions concerning certain facts ("contention interrogatories"). See B. Braun Medical, Inc. v. Abbott Laboratories, 155 F.R.D. 525 (E.D.Pa. 1994); Nestle Food Corp v. Aetna Cas. & Sur. Co., 135 F.R.D. 101 (D.N.J. 1990); In re One Bancorp. Securities Lit., 134 F.R.D. 4 (D. Me. 1991). But cannot ask for pure conclusions of law. Bynum v. United States, 36 F.R.D. 14, 15 (D.C. La. 1965).

(3) Miscellaneous considerations:

(a) Form interrogatories may be a useful starting place in drafting, but should be used with care.

(b) Definitions sections are frequently used in conjunction with interrogatories. By defining terms interrogatories can be shortened and unnecessary objections concerning ambiguity can be avoided. However, the requirements imposed by these sections are often ignored.

(4) Interrogatories that are objectionable in part, must be answered to the extent not objectionable. Fed. R. Civ. P. 33(b)(1). Thus, the rule codifies the common practice of:

(a) stating an objection to the interrogatory;

(b) re-stating the interrogatory in a non-objectionable way, and;

(c) answering the re-stated interrogatory.

c. Timing.

(1) A first set of interrogatories should be propounded as early as possible in order to secure necessary background information for the litigation.

(2) At a minimum, interrogatories should be propounded before depositions unless unusual circumstances dictate otherwise.

(3) A second set of interrogatories propounded late in the case, (i.e. a number of contention interrogatories) used in conjunction with requests for admission can be used to narrow the issues to be tried.

2. Request for Production of Documents and Things (Fed. R. Civ. P. 34).

a. General procedure.

(1) Applies only to parties. Hatch v. Reliance Ins. Co. 758 F.2d 409 (9th Cir. 1985), cert. den'd 474 U.S. 1021.

(2) Must set forth with "reasonable particularity" the documents or things to be produced for inspection, copying, or testing. What is an adequate description is a relative matter. You may designate documents by category. "The goal [of designating documents with reasonable particularity] is that the designation be sufficient to apprise a man of ordinary intelligence what documents are required and that the court be able to ascertain whether the requested documents have been produced." Wright & Miller, Federal Practice and Procedure, Civil § 2211 at 631; U.S. v. National Steel Corp., 26 F.R.D. 607 (C.D. Tex. 1960).

(3) The documents or things must be in the possession, custody, or control of the party.

(a) "Control" generally means the ability to obtain. Comeau v. Rupp, 810 F.Supp. 1127, 1166 (D.Kan. 1992) recon. den'd 810 F.Supp. 1172.

(b) Party seeking production does not have a right, however, to an authorization permitting independent access to the documents or things. Neal v. Boulder, 142 F.R.D. 325, 328 (D.Colo. 1992) (Opposing party was not entitled to an authorization to secure medical records).

(4) Must also set forth a reasonable time, place and manner for inspecting and copying.

(5) A response to a request for inspection must be served within 30 days, unless the court orders a shorter or longer time for it. A response is not production. The response simply agrees to permit inspection or objects.

(6) The responding party "shall" produce documents for inspection in the manner they are kept in the ordinary course of business or organize and label them to correspond with the categories of the request.

b. Drafting considerations for requests and responses

(1) "Reasonable particularity" requirement is one that will cause the most problems. If it can be misunderstood, it will be.

(2) In an effort to get all documents, tendency is to draft over-broad requests. May need to wait until answers to interrogatories are in before adequate production requests can be drafted.

(3) Following types of requests may be appropriate in most cases:

(a) Assuming an appropriate interrogatory was asked, the documents identified in the answer to the interrogatory.

(a) All documents referred to or consulted in preparing answers to interrogatories.

(4) Like interrogatories, the request for production must be tailored to the case at hand.

(5) Electronic information. Fed. R. Civ. P. 34 applies to information stored on any electronic media. Don't overlook the possibility that material subject to production may exist on floppies, hard disks, CD-ROM and may include draft versions of documents, E-Mail messages, databases and other information customarily stored on electronic media. See Zubulake v. UBS Warburg LLC, 02 Civ. 1243, U.S.D.C. (S.D.N.Y.) (Orders of May 13, 2003 and June 24, 2003).

c. Timing.

(1) The request for production should be served as early as possible in the litigation.

(2) Additional requests may be required as further discovery reveals the existence of documents that may not have been described in the initial request. The federal rules make no limitation on the number of requests which may be propounded and local rules seldom do.

(3) In the rare case where local rules limit the number of requests, a single interrogatory that requests the adversary to describe the documents, records and things which exist can be propounded prior to issuing the document request.

d. Securing documents from non-parties.

(1) Fed. R. Civ. P. 34 applies only to parties, therefore, must subpoena documents or things from non-parties.

(2) Can serve subpoena for the individual to appear at a deposition and produce described documents, or subpoena only the documents. Fed. R. Civ. P. 45. Any objection must be raised in court that issued subpoena, not forum court. In re Digital Equipment Corp, 949 F.2d 228 (8th Cir. 1991).

(3) If the discovery sought involves entering upon a non-party's land, such may now be had under amended Fed. R. Civ. P. 45.

3. Physical and Mental Examinations (Fed. R. Civ. P. 35).

a. General procedure.

(1) Absent agreement, an independent medical examination (IME) requires a court order.

(2) An IME is allowed of a party or a person under the custody or control of a party by a "suitably licensed or certified examiner." Fed. R. Civ. P. 35(a)

(3) An IME will be permitted only upon a showing of "good cause".

(a) The mental or physical condition of the person to be examined must be in controversy. A plaintiff in a personal injury case places his mental or physical condition in controversy and thus provides the defendant with good cause. Schlagenhauf v. Holder, 379 U.S. 104 (1964). See also Stanislawski v. Upper River Services, Inc., 134 F.R.D. 260 (D. Minn. 1991) (vocational examinations excluded).

(b) The mental condition of a party is not in issue simply because the intent of a party is in issue. Taylor v. National Group of Companies, Inc., 145 F.R.D. 79, 80 (N.D.Ohio 1992); but see Eckman v. University of Rhode Island, 160 F.R.D. 431 (D.R.I. 1995).

(4) Order must specify the time, place, manner, conditions, and scope of the examination, and the person or persons who will conduct the IME. Thus, all arrangements should be made prior to filing the motion.

(5) Person examined is entitled to a copy of the examiner's report upon request. If request is made, examined party must provide opponent with copies of reports of previous or subsequent examinations. By requesting and obtaining copy of examiner's report or by taking examiner's deposition, person examined waives any doctor-patient privilege that may apply to another person who has examined him or who may examine him in the future with respect to the mental or physical condition in issue.

b. Practical Considerations.

(1) Fed. R. Civ. P. 35 exam can be arranged by stipulation or agreement of the parties. Same general rules concerning exchange of reports, etc., apply to examinations by stipulation unless agreement provides otherwise.

(2) An IME conducted too early in the course of the patient's illness or recovery period may not be valid at the time of trial. For example, an early IME may not provide the patient with enough time to fully improve, and thus, be of little help in minimizing damages. On the other hand, an IME too late may blow any chance of settlement for a reasonable amount or put you in a bind to locate an additional expert to address some condition the examination revealed. Thus, the timing of the IME is important, but it must depend upon the unique circumstances of each case.

(3) A thorough exam by a competent physician may reveal that the adverse party patient is severely disabled and has very little chance of recovery. Thus, you may be helping your opponent's case by seeking the IME. Don't seek an IME until you have obtained all of the plaintiff's medical records and have had them reviewed by appropriate consultants. You may find that an exam is not really needed.

(4) While the rule allows mental as well as physical exams, approach the mental IME with care. Experience shows that a psychiatric/psychological examination seldom results in a diagnosis of no abnormality.

4. Requests for Admissions (Fed. R. Civ. P. 36).

a. Purpose of the rule is to eliminate issues that are not really in dispute and to facilitate the proof of those issues that cannot be eliminated.

b. Request may go to any matter within the scope of discovery. Thus, not strictly limited to seeking admissions of "facts." Furthermore, it is not grounds for objection if the request goes to central facts upon which the case will turn at trial. See, e.g., Pleasant Hill Bank v. United States, 60 F.R.D. 1 (W.D. Mo. 1973). Prior to the 1970 amendments to the Federal Rules, some courts would restrict the use of Fed. R. Civ. P. 36 and not permit requests that went to "ultimate facts," "mixed law and fact," and "opinion." The 1970 changes provide for Fed. R. Civ. P. 26(b) to govern the scope of the request.

c. General Procedure

(1) Each request must be separately set forth.

(2) Responding party has 30 days within which to answer, unless the court orders a shorter or longer time.

(3) Unless answers are served within the time permitted, the requests will be deemed admitted. Fed. R. Civ. P. 36(a); United States v. Kasuboski, 834 F.2d 1345 (7th Cir. 1987); Dukes v. South Carolina Ins. Co., 770 F.2d 545 (5th Cir. 1985); E.E.O.C. v. Jordon Graphics, Inc., 135 F.R.D. 126 (W.D.N.C. 1991).

(4) Answers must fairly meet the substance of the request. Cannot evade a response due to lack of "information or knowledge" unless you make a reasonable inquiry in an attempt to gain the information upon which either an admission or a denial can be based. Fed. R. Civ. P. 36(a); United States v. Kenealy, 646 F.2d 699 (1st Cir. 1981), cert. den'd, 454 U.S. 941 (1981). Johnson Intern. Co. v. Jackson Nat. Life Ins. Co., 812 F.Supp. 966 (D. Neb. 1993), aff'd and remanded 19 F.3d 431.

(5) Court has discretion to permit party to withdraw a prior admission or to relieve a party from the effect of an admission for failure to respond. Fed. R. Civ. P. 36(b). Whether the court will exercise that discretion and give the party relief will depend upon the prejudice to the other party and whether the party seeking relief has acted in good faith. Donovan v. Buffalo Downtown Dump Truck Service & Supplies, Inc., 1 Fed. Rules Serv. 3d (Callaghan) 561 (W.D.N.Y. 1985); Baleking Systems, Inc., 40 Fed. Rules Serv. 2d (Callaghan) 1177 (D. Ore. 1984); Gardella v. United States, 23 Fed. Rules Serv. 2d (Callaghan) 867 (D. Mass. 1977).

(6) If a party fails to admit in response to a request and the requesting party subsequently proves the truth of the matter embodied in the request, the party refusing to admit may be required to pay the requesting party's expenses incurred in proving the matter, including reasonable attorney's fees. Fed. R. Civ. P. 37(c).

d. Practical Considerations.

(1) Careful drafting is required. Limit the scope of each request. The narrower the better. "Admit that plaintiff's injuries were proximately caused by his own contributory negligence" v. "Admit that plaintiff consumed four beers between 6:00 p.m. and 8:30 p.m."

(2) Use of request for admissions early in the case will limit the issues and probably save considerable discovery. But, if local rules limit the number of requests it is usually better to wait until after some discovery has been conducted in order to make the best use of the requests.

(3) Requests for admission are particularly well suited for easing introduction of documentary evidence.

(4) Consider using requests for admissions and interrogatories in conjunction. E.g.:

"Admit that plaintiff's tumor was not a prolactin secreting tumor."

"If your response to the foregoing Request for Admission was anything other than an unqualified admission, please set forth with specificity all the evidence and information, including testimony and records of every kind, that you contend supports your response."

(5) United States Attorneys cannot admit liability in cases seeking damages in excess of their settlement authority. Thus, when the request for admission asks the U.S. to admit negligence or liability, the U.S. Attorney may not be permitted to admit, even if an admission is appropriate, without the approval of DOJ. Most cases can be handled with a denial since the request will be so broad and will cover so many issues that an unqualified admission will not be required. Furthermore, if the admission comes early in the case an inability to either admit or deny due to the incomplete nature of the investigation may be appropriate. Difficulties arise, however, where the opponent submits well drafted admissions directed to each of the underlying facts comprising the plaintiff's case. These cannot be avoided and counsel should notify DOJ ASAP.

D. Appellate Review of Discovery Orders

1. Most discovery orders are interlocutory and not immediately appealable. After judgment when they may be appealed, it is often difficult to show prejudice or how the issue is not now moot.

2. Varying ways to seek immediate review are on contempt citations, by writ of mandamus, on appeal from the quashing of a subpoena or on interlocutory appeal under 28 U.S.C. § 1292(b).

3. The standard of appellate review is highly deferential (abuse of discretion). See Boardman v. National Medical Enterprises, 106 F.3d 840 (8th Cir. 1997); In re San Juan DuPont Plaza Hotel Fire Litigation, 859 F.2d 1007 (1st Cir. 1988).

This page left intentionally blank.